devisees of other lands. *In re Chant*, [1905] 2 Ch. 225. By previous adjudication it has been decided in England that the life tenant, since it is his duty to keep down the interest on the estate, by virtue of his tenancy, has implied authority to bind those in remainder.[5] No such identity of interest, with the resulting implication of authority, seems to be recognized in this country.[6] But in going beyond this step and holding that payment by the life tenant keeps alive the testator's debt against the estate of specific devisees of other land the court followed what are in fact *dicta* in an earlier case which have been much criticised in later English decisions.[7] Not even in England can one devisee, as such, deprive another of his statutory privilege.[8] In this country payment by a widow of mortgaged premises has been held not to remove the bar as against the heir.[9] Again, payment by the heir or grantee of the mortgagor as to part of mortgaged premises does not arrest the operation of the statute in favor of the grantee of another part.[10] Though American cases of this nature have been rare, they show a desirable uniformity with the cases of joint obligation, and a tendency to restrict the anomalous doctrine of part payment to its proper, narrow limits.

RECENT CASES.

ACCORD AND SATISFACTION — VALIDITY — EFFECT OF STATUTE OF FRAUDS. — In consideration that the defendant marry him, the plaintiff orally promised to consider a debt which the former owed him as paid and satisfied. After marriage the plaintiff brought action on the obligation and, to the defendant's plea of accord and satisfaction, objected that as the agreement was oral, it was invalid under the Statute of Frauds making contracts in consideration of marriage unenforceable. *Held*, that the plea is good. *Weld* v. *Weld*, 81 Pac. Rep. 183 (Kan.).

There are two possible views of the nature of an accord and satisfaction. The first is illustrated by the present case, which regards it as an executed agreement whereby the original obligation is utterly extinguished. *Lavery* v. *Turley*, 6 H. & N. 239. The other theory holds that it is a contract executory as to the obligee's promise. He has agreed never to sue on his original obligation which is considered as still existing; and this promise is enforced by courts of law as a defense to the original liability. This view is suggested by the rule that upon the rescission of the accord and satisfaction the original obligation may be sued upon. *Heavenrich* v. *Steele*, 57 Minn. 221. However, as this rule is supported upon the ground that the extinguished obligation is revived by the rescission, it furnishes but slight basis for the second theory. Furthermore, as the plea of accord and satisfaction was recognized before a contract never to sue or indeed before any simple contract was known to the law, the theory that in allowing this defense the court is merely enforcing the plaintiff's promise not to sue, is clearly untenable. Y. B. 21 & 22 Edw. I. 586 (Rolls series).

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[5] Roddam *v.* Morley, 1 De G. & J. 1; *In re* Hollingshead, 37 Ch. D. 651.

[6] Ætna Life Insurance Co. *v.* McNeely, 166 Ill. 540.

[7] Roddam *v* Morley, *supra*. For a consideration of the English authorities, see 49 Sol. J. 563, 682.

[8] See Dickenson *v.* Teasdale, 1 De G. J. & S. 52; Cooper *v.* Cresswell, L. R. 2 Ch. 112.

[9] Nickell *v.* Leary, 91 N. Y. Supp. 287; Ætna Life Insurance Co. *v.* McNeely, *supra*.

[10] Murdock *v.* Waterman, 145 N. Y. 55; Mack *v.* Anderson, 165 N. Y. 529.

ADVERSE POSSESSION — LIFE TENANT UNDER VOID DEVISE HOLDING AGAINST REMAINDERMAN. — A married woman, who was legally without testamentary capacity, devised certain land to her husband for life with remainder to the plaintiff. The husband entered at his wife's death and held possession for twenty-one years, devising the property upon his death to the defendant. *Held*, that the defendant has title. *In re Anderson*, [1905] 2 Ch. 70.

Where a testator without title devises land to A for life with remainder to B, and A occupies for twenty years, it has been held that the true owner is barred, but that A is estopped to deny B's right to the remainder. *Board* v. *Board*, L. R. 9 Q. B. 48; *Dalton* v. *Fitzgerald*, [1897] 2 Ch. 86. The present decision, which distinguishes between a valid will by a testator without title, and a void will by one having title, disregards the intention to claim only a life estate. See *Paine* v. *Jones*, L. R. 18 Eq. 320, 326; but *cf. Kernaghan* v. *M'Nally*, 12 Ir. Ch. 89. As it is the intention which determines whether the possession is adverse, so it would seem that the intention should determine the *quantum* of the estate. *Cf. Bond* v. *O'Gara*, 177 Mass. 139. It would appear better not to invoke the doctrine of estoppel, but to regard the entry of the claimant as in the nature of a tortious feoffment, effecting a disseisin of the true owner and vesting in the disseisor a tortious life estate, with a tortious remainder in the person whom he recognizes as remainderman. The owner, having been thus disseised, is barred after the statutory period, and the tortious estate becomes lawful. Under this doctrine the rights of the remainderman would be independent of any instrument purporting to convey title.

AGENCY — AGENT'S LIABILITY TO THIRD PERSONS — CONTRACTUAL RESPONSIBILITY WHEN PRINCIPAL IS FICTITIOUS. — The defendant, as agent for a non-existing corporation, took a lease under seal from the plaintiff. *Held*, that the agent is liable on the lease for the rent. *Schenkberg* v. *Treadwell*, 94 N. Y. Supp. 418.

On strict theory this *per curiam* opinion seems difficult to support. By the weight of authority, when an unauthorized agent makes a contract for a principal actually existing, the agent is not liable on the contract. *Lewis* v. *Nicholson*, 18 Q. B. 503; *Noe* v. *Gregory*, 7 Daly (N. Y.) 283. When the principal is fictitious, however, the agent is often held liable on the contract, on the ground that otherwise it would be wholly inoperative. *Kelner* v. *Baxter*, L. R. 2 C. P. 174. Yet in the real essence of the situation, there is little difference between a principal who gives no authority and one who does not exist. See *Bartlett* v. *Tucker*, 104 Mass. 336. But here the instrument is under seal; and however loosely a simple contract may be treated, the law is strict that only those named as parties to a sealed instrument can sue or be sued upon it. *Henricus* v. *Englert*, 137 N. Y. 488. There seems to be no urgent necessity for relaxing the rule in the case at hand, as an adequate remedy lies for deceit, or for breach of an implied warranty of authority. *Polhill* v. *Walter*, 3 B. & Ad. 114; *Collen* v. *Wright*, 8 E. & B. 647.

BANKRUPTCY — PREFERENCES — SURRENDER. — At the suit of a trustee in bankruptcy, a mortgage given by the bankrupt to a creditor who retained it in good faith was adjudged void as a preference. Thereafter the trustee refused to permit proof of the creditor's claim because the latter had not surrendered his preference within the meaning of § 57 g of the Bankruptcy Act, which provides in substance that claims of preferred creditors shall not be allowed unless they surrender their preferences. *Held*, that proof of the claim be allowed. *Keppel* v. *Tiffin Savings Bank*, 25 Sup. Ct. Rep. 443.

The lower federal courts have generally held that a creditor who retains his preference until judgment depriving him of it cannot prove his claim since he has not "surrendered" his preference. *Re Greth*, 112 Fed. Rep. 978. A realization of the hardship of this result, however, induced some courts to suspend judgment for a reasonable time in order to enable a creditor who had acted in good faith to surrender his preference and thus to prove his claim. *Zahm* v. *Fry*, Fed. Cas. 18198. In the present case, the court avoided penalizing the creditor by construing the word "surrender" to mean the transfer of

a preference after judgment. Undoubtedly the purpose of § 57g is not penal, but is to secure a fair distribution of the debtor's assets. See *Pirie* v. *Chicago, etc., Co.*, 182 U. S. 438, 449. The interpretation which would effectuate this purpose without doing violence to the expressed intent of the legislature is best. And this consideration certainly goes far to justify the somewhat strained construction resorted to by the court. It is, however, questionable whether this was not a case for legislative action rather than judicial construction.

BILLS AND NOTES — NEGOTIABILITY — CERTAINTY IN AMOUNT. — In an interest-bearing note it was provided that interest not paid semi-annually should become a part of the principal and itself bear interest. *Held*, that the amount of the note is not thereby rendered uncertain, nor the negotiability of the note destroyed. *Brown* v. *Vossen*, 87 S. W. Rep. 577 (Mo., Kansas City Ct. App.)

In order that a note shall be negotiable it must be for a sum certain. *Palmer* v. *Ward*, 72 Mass. 340. But this rule has been considerably weakened, and much uncertainty and confusion has arisen from a loose interpretation of the words "sum certain." At present the weight of opinion seems to be that a provision for increasing the rate of interest after maturity does not destroy negotiability. *Towne* v. *Rice*, 122 Mass. 67. Nor is negotiability impaired by a stipulation for payment of attorneys' fees and costs in case suit is brought to enforce collection. *Adams* v. *Addington*, 16 Fed. Rep. 89. But an agreement to pay a sum named "with exchange" is not negotiable. *Hughitt* v. *Johnson*, 28 Fed. Rep. 865. The distinction drawn is that the amount of the agreement at maturity depends on the fluctuations of exchange; while in the two former cases the amount is certain if paid at maturity. In the case at hand the amount of the note at maturity clearly depends on a contingency; to call it a sum certain seems a contradiction in terms.

CARRIERS — DELAY — LIABILITY FOR DELAY CAUSED BY STRIKE. — *Held*, that where cattle were injured in transportation by delay caused by the interference of strikers, the carrier is not liable if it has exercised reasonable diligence to expedite the shipment. *Sterling* v. *St. Louis, etc., R. R. Co.*, 86 S. W. Rep. 655 (Tex., Civ. App.). See NOTES, p. 54.

CARRIERS — TICKETS — EJECTION. — A contract between the parties provided that the appellant should furnish transportation to the appellee, on condition that the contract should be presented to and endorsed by the former's agent. The agent refused to endorse it. In consequence, the appellee was ejected from the train for not paying his fare. *Held*, that the appellant is liable for the ejectment. *Texas, etc., Ry. Co.* v. *Payne*, 87 S. W. Rep. 330 (Tex., Sup. Ct.).

Although there is a well defined conflict of authorities, the better opinion seems to be that the carrier is not liable for ejecting a passenger who is without an apparently good ticket, if he refuses to pay his fare. See 9 HARV. L. REV. 353. This conclusion is reached either upon the basis of reasonable regulations, or by the application of the law of contracts. See 12 HARV. L. REV. 61. The present decision is of interest because a formal written contract is involved instead of a mere ticket, and because the court bases its reasoning on principles of contract law. Yet it seems that in this case, at any rate, the opposite result would be reached by this method. The railroad company has promised to transport the appellee only on condition that the agent endorse the contract. This condition precedent has not happened; hence the company has not broken its promise of transportation. The conclusion is unavoidable that the appellant is liable for its agent's refusal to endorse the contract, but not for the ejectment of appellee. See *Frederick* v. *Marquette, etc., R. R. Co.*, 37 Mich. 342, 346.

CHINESE EXCLUSION ACTS — EXCLUSION OF CHINAMAN CLAIMING CITIZENSHIP. — The Chinese Exclusion Act of 1894, as amended by the Act of 1903, provided that the decision of the appropriate immigration officers excluding an alien should be final unless reversed on appeal to the Secretary of Commerce and Labor. The latter official denied admission to a Chinaman who alleged

that he was a native-born citizen of the United States returning after a temporary absence. *Held*, that the decision is not reviewable by the federal courts. Brewer, Day and Peckham, JJ., dissented. *United States* v. *Ju Toy*, 25 Sup. Ct. Rep. 644.

The constitutionality of this power of the Secretary of Commerce in cases where the applicant is admittedly an alien, seems to be settled. *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659. It has also been held that an applicant claiming citizenship cannot resort to the federal courts before he has prosecuted an appeal to the Secretary. *United States* v. *Sing Tuck*, 194 U. S. 161. It is clear that the constitutional guaranties relating to the trial of criminals have no application, as the inquiry is not a criminal proceeding. *Cf. Fong Yue Ting* v. *United States*, 149 U. S. 698. A more serious question is whether Congress has not invested executive officials with power properly belonging to the judiciary and contravening the requirement of due process of law. It may be that the power to exclude or expel persons admittedly aliens is political in its nature, and the official's decision in regard to such persons is due process of law. *Japanese Immigrant Case*, 189 U. S. 86. But if the applicant be in fact a citizen of the United States, he cannot be excluded except as a punishment for crime. See *In re Sing Tuck*, 126 Fed. Rep. 386, 388; *Lee Sing Far* v. *United States*, 94 Fed. Rep. 834, 836. It would seem, therefore, that the determination of his constitutional right of citizenship is a judicial and not an executive function.

CONFLICT OF LAWS — PRIORITY AMONG SUCCESSIVE ASSIGNEES IN DIFFERENT JURISDICTIONS. — A, while domiciled in New York, assigned to B his reversionary interest in an estate invested in English trust securities. Later, while in England, A assigned this reversionary interest to the plaintiff, who at once notified the trustees. Afterwards B gave notice of the earlier assignment. *Held*, that the plaintiff has the priority. *Kelly* v. *Selwyn*, [1905] 2 Ch. Rep. 117.

The question here involved seems to have arisen for the first time. By New York law, notice to a debtor or to a trustee is not necessary to complete an assignment of a chose in action or of a reversionary interest in personalty. *Muir* v. *Schenck*, 3 Hill (N. Y.) 228; *Fortunato* v. *Patten*, 147 N. Y. 277. But in England, a subsequent assignee secures preference if he gives notice first to the debtor or trustee, provided he had no notice of the prior assignment. *Dearle* v. *Hall*, 3 Russ. 1; *Foster* v. *Blackstone*, 1 Myl. & K. 297. The court admits that the New York assignment was valid in accordance with the general rule that the validity of an assignment of a chose in action is determined by the law of the place of transfer. *Alcock* v. *Smith*, [1892] 1 Ch. Rep. 238; *May* v. *Wannemacher*, 111 Mass. 202. But it takes the sound view that in administering an English trust fund, the order in which claimants will be entitled must be regulated by the law of the court administering the fund. Those claiming as assignees, therefore, will have priority according to the order in which they have given notice and thereby have completely constituted themselves *cestuis que trust* under the English law.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — NON-RESIDENT DEFENDANT. — An abandoned spouse removed to another state, where he acquired a *bona fide* domicile, and later instituted divorce proceedings. Substituted service of process was made upon the non-resident defendant in accordance with the laws of the state granting the divorce. *Held*, that the decree of divorce is entitled to full extra-territorial validity under the "full faith and credit" clause of the Federal Constitution. *North* v. *North*, 93 N. Y. Supp. 512.

The New York courts regard divorce as a proceeding *in personam*. *People* v. *Baker*, 76 N. Y. 78. They have consistently held that no foreign divorce obtained against a non-resident, non-appearing defendant would have extra-territorial validity, unless the defendant was personally served with process within the jurisdiction of the divorce court. *O'Dea* v. *O'Dea*, 101 N. Y. 23. So serious are the objections to this doctrine, that most courts have rejected it as unsound. See 15 HARV. L. REV. 66; 18 *ibid.* 215. The rule has been

modified by a recent decision holding that where an abandoned spouse sues in the state of the last matrimonial domicile, and substituted service was made upon the non-resident defendant, divorce so procured is entitled to extra-territorial validity under Art. 4, § 1 of the Federal Constitution. *Atherton* v. *Atherton*, 181 U. S. 155, reversing S. C., 155 N. Y. 129. The present decision is a further extension of this rule to the case where the abandoned spouse sues in another state in which he has acquired a *bona fide* domicile. The reasons which underlay the former decision would seem to hold equally here, and the case marks an important development in this branch of the New York law.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHT OF STOCKHOLDERS TO ELECT DIRECTORS. — A minority stockholder prayed for a decree enjoining the Equitable Life Assurance Society from amending its charter so as to allow its policy holders to elect twenty-eight out of fifty-two directors. *Held*, that the right to influence the management of a company by the selection of its directors is a property right, of which the amendment would deprive the plaintiff without due process of law, and that the motion should therefore be granted. *Lord* v. *Equitable, etc*, *Society*, 94 N. Y. Supp. 65.

This decision seems to flow naturally from two established doctrines. The right of a stockholder to vote is an essential part of his property right in the stock. *Kinnan* v. *Sullivan County Club*, 26 N. Y. App. Div. 213. And it is unconstitutional to deprive an owner of any essential attribute of his property without due process of law. *Matter of Jacobs*, 98 N. Y. 98; *People* v. *Otis*, 90 N. Y. 48. The defendants cited two cases: one holding valid a statute allowing cumulative voting for directors, the other sustaining a statute which increased the proportion of railroad directors to be elected by a municipal stock-holding corporation, the original allotment having become unjust because of the failure of several subscribers to pay in their subscriptions. *Looker* v. *Maynard*, 179 U. S. 46; *Miller* v. *State*, 15 Wall. (U. S.) 478. These cases are not exactly in point. One regulates the property right of voting one's stock; the other restores the conditions of proportionate division of directors under which the plaintiffs had subscribed. The mutualization would take out of the control of the stockholders the surplus in which they have a right to share, and would, therefore, be a "taking of property without due process." For a more extended discussion of the case, see 17 GREEN BAG 353.

CONSTITUTIONAL LAW — EMINENT DOMAIN — LAND TAKEN FOR PRIVATE IRRIGATION DITCH. — *Held*, that a state statute authorizing a landowner to condemn a right of way over adjoining land for the construction of an irrigation ditch to supply water for his own land, is constitutional. *Clark* v. *Nash*, 198 U. S. 361.

The court, in affirming the decision of the Supreme Court of Utah, bases its opinion wholly upon the peculiar agricultural conditions in that state. For a discussion of the principles involved, see 17 HARV. L. REV. 493.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — FREEDOM TO CONTRACT. — A statute made it obligatory upon any person or corporation issuing in payment of wages an order upon its store for goods to redeem such order in lawful money or goods at the option of the holder. *Held*, that this statute is unconstitutional. *Leach* v. *Missouri, etc., Co.*, 86 S. W. Rep. 579 (Mo., Ct. App.).

A like statute has been declared constitutional by the Supreme Court of the United States upon the ground that it is a valid exercise of the police power. *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13. The purpose of such legislation is to protect workmen from unscrupulous exactions. Undoubtedly where the laborer is at a great disadvantage in bargaining with his employer such protection is desirable and may be justified under the police power. But whenever the situation of the employee, due to industrial conditions such as the scarcity of labor or the strength of trade unions, is such that he can adequately protect his interests, state interference would be unnecessary. Under these conditions statutes aimed to accomplish this purpose, not being justified as an exercise of the police power, would be unconstitutional as an

interference with the liberty to contract. See *In re Preston*, 63 Oh. St. 428, 438. The constitutionality of such a law, therefore, would depend in each case upon the question of fact as to the local industrial conditions.

CONTRACTS — DEFENSES: NON-PERFORMANCE BY PLAINTIFF — REPUDIATION AS WAIVER OF VALID DEFENSE. — The defendant, on insufficient grounds, repudiated a contract to buy goods in two installments. The plaintiff thereafter made tender of the goods. *Held*, that by repudiating, the defendant bars himself from setting up the defectiveness of the first installment, subsequently discovered, as a defense. *Braithwaite* v. *Foreign Hardwood Co.*, 21 T. L. R. 413 (Eng., C. A.).

According to the recognized English doctrine regarding anticipatory breach, the innocent party, by not acting on the repudiation, treats the contract as still existing, and holds the other party to its performance. See 14 HARV. L. REV. 317, 422. In such a case the only effect of the repudiation is to free the plaintiff from liability for any failure on his part directly caused by the defendant's repudiation. See *Cort* v. *Ambergate, etc., Co.*, 17 Q. B. 127. In all other respects the repudiator may avail himself of all rights under the contract, *Smith* v. *Georgia Loan Co.*, 113 Ga. 975. In the principal case the plaintiff clearly treated the contract as subsisting. If, then, the defendant had a defense, as the trial judge seemed to admit, because of the defectiveness of the first consignment, he should not be barred from setting up such valid defense by previously asserting an untenable ground for repudiation. See *In re London, etc., Bank*, L. R. 7 Ch. 55. This is true for the reason that the plaintiff must broadly aver performance of all conditions, express and implied, and under the supposed facts he cannot sustain his allegation. *Green* v. *Edgar*, 21 Hun (N. Y.) 414. Whether the plaintiff's breach of improper shipments would have warranted the defendant in treating the contract broken, on his part, was a question of fact which should be dependent on the materiality of the breach, of which the element of *in limine* was an important consideration. See 18 HARV. L. REV. 61.

CORPORATIONS — FOREIGN CORPORATIONS — RIGHT OF ACTION AGAINST. A New Jersey statute requires foreign corporations wishing to do business in the state to designate an agent to receive service of process in actions against the company. *Held*, that service on the agent after the company has ceased doing business in the state gives the court jurisdiction over the corporation. *Groel* v. *United Electric Co.*, 60 Atl. Rep. 822 (N. J., Ch.). See NOTES, p. 52.

CORPORATIONS — INSOLVENCY OF CORPORATION — RIGHT OF SIMPLE CONTRACT CREDITOR TO APPOINTMENT OF RECEIVER. — *Held*, that a creditor of a corporation, who has not reduced his claim to judgment, cannot maintain a suit for the appointment of a receiver, although all the assets of the corporation have been distributed among its individual members. *McKee* v. *City Garbage Co.*, 103 N. W. Rep. 906 (Mich.).

The general rule is that a creditor is not entitled to the appointment of a receiver until he has secured a judgment and exhausted his remedy at law by having an execution issued and returned unsatisfied. *Adee* v. *Bigler*, 81 N. Y. 349. Some courts, however, have departed from this rule in cases where the assets of an insolvent corporation were in danger of being lost or fraudulently disposed of by its officials, and the remedy at law was inadequate. *Cf. Kentucky, etc., Ass'n* v. *Galbreaith*, 77 S. W. Rep. 371; *Doe* v. *Northwest, etc., Co.*, 64 Fed. Rep. 928. These decisions have, in some instances, been rested upon the theory that the assets of a hopelessly insolvent corporation are a trust fund for the benefit of its creditors; while other courts have proceeded upon the ground of the danger of loss to the creditors and the evident inadequacy of the legal remedy. This departure from the general rule would seem a legitimate extension of equity's jurisdiction in accordance with the fundamental principle that equity grants relief where the remedy at law is inadequate.

DEDICATION — NATURE AND SCOPE — PRESUMED DEDICATION OF JUS SPATIANDI. — *Held*, that by user alone the public cannot acquire the right to

visit an historic monument on private grounds or to use a way leading to it through the owner's premises. *Attorney-General* v. *Antrobus*, [1905] 2 Ch. 188. See NOTES, p. 55.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS, AND DUTIES — POWER TO SELL IS NOT POWER TO MORTGAGE. — Executors, authorized to sell land, mortgaged it to the defendant, who had full knowledge of the facts. *Held*, that the estate is liable in equity to pay the mortgage debt. One judge dissented. *Thomas* v. *Provident Life & Trust Co.*, 138 Fed. Rep. 348 (C. C. A., Ninth Circ.).

A power to sell imports a power to sell "out and out," and will not justify a mortgage without positive evidence of such an intention. *Ferry* v. *Laible*, 31 N. J. Eq. 566; *Hoyt* v. *Jaques*, 129 Mass. 286. This is because the testator's intention was to effect a conversion of the property. *Haldenby* v. *Spofforth*, 1 Beav. 390. A sale is essentially distinct from incurring an indebtedness, and so it is said a power to sell negatives a power to mortgage. *Bloomer* v. *Waldron*, 3 Hill (N. Y.) 361, 368. But where the object clearly was that the property should be kept intact, subject only to raise a sum of money for a particular purpose, it is sometimes said that a power to sell will authorize a mortgage. *Loebenthal* v. *Raleigh*, 36 N. J. Eq. 169. No such purpose, however, appears here, and the case, therefore, seems squarely opposed to the general rule. The only basis found for the decision is a *dictum* by Lord Macclesfield, to which the subsequent cases in point are traceable. *Mills* v. *Banks*, 3 P. Wms. 1; see 2 CHANCE, POWERS, London ed. 1831, 388.

HIGHWAYS — RIGHTS OF ABUTTERS — RIGHT TO SHADE TREES. — The defendant negligently destroyed shade trees planted in front of the plaintiff's property by his predecessor in title. The plaintiff did not own the fee of the street, but the jury found that the market value of his property had been diminished. *Held*, that the plaintiff can recover. Three justices dissented. *Donahue* v. *Keystone Gas Co.*, 181 N. Y. 313.

In jurisdictions which hold that the abutter owns the fee of streets, he obviously has title to shade trees growing therein and can recover for injuries to them. *Phifer* v. *Cox*, 21 Oh. St. 248. Where the fee is by statute or charter vested in the municipal corporation, courts have held that abutting owners have in the street rights to light, air and access. *Abendroth* v. *Manhattan Ry. Co.*, 122 N. Y. 1. This right is defined as in the nature of an easement arising by operation of law by virtue of the proximity of the abutting property to the street. See *Kane* v. *New York Elevated R. R. Co.*, 125 N. Y. 164, 180. The principal case extends this doctrine and follows an earlier decision in which the plaintiff recovered for injuries to trees which he himself had planted. See *Lane* v. *Lamke*, 53 N. Y. App. Div. 395. The existence of this so-called easement, though dependent on the *fiat* of the court, seems to be practically desirable. The unlawful cutting of shade trees in a highway is deemed in equity irreparable injury. *Cf. Tainter* v. *Mayor of Morristown*, 19 N. J. Eq. 46, 58. The requirement that the abutter must have sustained peculiar damage in addition to that suffered by the public is supplied by the diminution in the market value of his property.

INFANTS — UNBORN CHILDREN — RIGHTS OF POSTHUMOUS CHILDREN UNDER CIVIL DAMAGE LAWS. — *Held*, that an act giving a right of action to any person damaged in his means of support in consequence of the unlawful sale of liquor applies to a child born after the death of its father resulting from such sale. *State ex rel. Niece* v. *Soale*, 74 N. E. Rep. 1111 (Ind., App. Ct.).

An unborn child has been uniformly denied a right of recovery for physical injuries negligently caused before birth. *Allaire* v. *St. Luke's Hospital*, 184 Ill. 359. Nor is such an infant regarded as a "person" under statutes similar to Lord Campbell's Act allowing suit by representatives of deceased persons. *Gorman* v. *Budlong*, 23 R. I. 169. These decisions are based on the ground that such a child is part of its mother. See *Dietrich* v. *Inhabitants of Northampton*, 138 Mass. 14. It has been argued, however, that logical con-

sistency may be maintained by predicating a right to bodily integrity upon birth, a breach of which, though previously occasioned, does not arise until after parturition. See 15 HARV. L. REV. 313. However, statutes permitting children to recover for loss of support through death of their father are construed to apply to posthumous children. The right of support is regarded as a property right, and the analogy of cases, allowing unborn children equal property rights with living children, is followed. *Cf. Quinlen* v. *Welch*, 69 Hun (N. Y.) 584. While the principal case gives "person" a latitude it has not heretofore received, it is a statutory construction which does not encounter the objection of policy that would confront a recognition of the right to bodily integrity.

INJUNCTIONS — NATURE AND SCOPE OF REMEDY — ILLEGALITY AS AFFECTING PLAINTIFF'S RIGHTS. — The plaintiff collected continuous quotations from the floor of its produce exchange, and under a contract with a telegraph company distributed them to subscribers only. The defendant, though not a subscriber, in some way procured and was distributing plaintiff's quotations. *Held*, that he will be restrained from so doing. *Board of Trade of Chicago* v. *Christie Grain and Stock Co*, 25 Sup. Ct. Rep. 637.

The jurisdiction of equity to protect such property as market quotations or news items has already been recognized. *Exchange Tel. Co.* v. *Gregory & Co.*, (1896), 1 Q. B. 147; *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed. Rep. 294. Several federal courts, however, have hitherto refused relief to this plaintiff on the ground that it was violating an Illinois statute against maintaining a place where the pretended buying and selling of stocks or produce is permitted. *Board of Trade of Chicago* v. *O'Dell Com. Co.*, 115 Fed. Rep. 574; *Board of Trade of Chicago* v. *Donovan Com. Co.*, 121 Fed. Rep. 1012. The Supreme Court concludes that such is not the case, and adds that even though it were, the fact would not be a defense to the present suit. This may be because the property right claimed is distinct and separate from any possible illegality in the conduct of the business. See *Fuller* v. *Berger*, 120 Fed. Rep. 274; 16 HARV. L. REV. 444. A further defense is disposed of by the holding that the contract of the plaintiff with the telegraph company is unnecessary to the course of action; but even if requisite it is said not to be in aid of a monopoly or in restraint of trade, as urged by the defendant.

INTERSTATE COMMERCE — INTOXICATING LIQUORS — WILSON ACT OF 1890. — A Missouri statute imposed a fee for an inspection of all intoxicating liquors within the state. As the cost of inspection was considerably less than the fee, the act produced a large revenue. *Held*, that under the Wilson Act the statute is not unconstitutional as applied to beer shipped from another state. *Pabst Brewing Co.* v. *Crenshaw*, 25 Sup. Ct. Rep. 552. See NOTES, p. 53.

LANDLORD AND TENANT — EVICTION — ACT DONE BY LANDLORD AS OWNER OF ADJOINING PREMISES. — The defendant leased a house and lot to the plaintiff for the purpose of conducting a saloon. Later, by virtue of his ownership of adjoining lots, the defendant signed a protest and prevented the plaintiff from obtaining a license. *Held*, that this does not constitute a constructive eviction. *Kellogg* v. *Lowe*, 80 Pac. Rep. 458 (Wash.). See NOTES, p. 50.

LIMITATION OF ACTIONS — NEW PROMISE AND PART PAYMENT — EFFECT OF PAYMENT BY LIFE TENANT AS AGAINST REMAINDERMEN AND DEVISEES. — The defendants were at once remaindermen after a life estate under a will, and devisees of other property. *Held*, that under a statute making real estate assets for simple contract debts of the deceased, part payment by the tenant for life under the will tolls the statute of limitations as against the defendants. *In re Chant*, [1905] 2 Ch. 225. See NOTES, p. 57.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — DEFECTIVE SCHOOLHOUSE. — The plaintiff, a pupil in a public school, sued the city for

damage suffered by falling from a negligently constructed stairway in the school building. *Held*, that she cannot recover. *Clark* v. *City of Nicholasville*, 87 S. W. Rep. 300 (Ky., Sup. Ct.).

In determining a municipal corporation's liability, courts make an important distinction between governmental and ministerial functions. For damage due to negligent exercise of the former, no common law liability exists. But in the case of the latter, the corporation is treated like a private person. See DILL, MUNIC. CORP., 4th ed., § 949; 15 HARV. L. REV. 736. Thus a town is not liable for damage caused by faulty construction in a hall where a town-meeting is being held. *Eastman* v. *Meredith*, 36 N. H. 284. But it is liable for damage caused in a like manner when the building has been rented. *Worden* v. *City of New Bedford*, 131 Mass. 23. Though easily stated and illustrated, this principle is often difficult to apply. The authorities are not agreed as to what acts should be considered governmental. The maintenance of schools was certainly no part of the original conception of government. As conditions change, however, the state assumes new duties which become a part of its system of government conceived in a broad sense. The carrying on of schools may well be considered one of these new functions. What authority there is seems to be in harmony with this view. See *Sullivan* v. *City of Boston*, 126 Mass. 540; *Wixon* v. *City of Newport*, 13 R. I. 454.

RELEASE — CONSTRUCTION AND OPERATION — DEBTS DUE RELEASER UNDER ALIAS. — The defendant became indebted to the plaintiff, in two sets of transactions, the plaintiff figuring under his own name in one, and under an assumed name in the other. The defendant did not suspect the identity of his creditors. The plaintiff executed to the defendant a release, under his proper name, of all claims, but made no mention of his transactions under the alias. *Held*, that as the plaintiff had appeared in person to the defendant when he executed the release, it discharged all the debts due the plaintiff both in his proper name and under his assumed name. *Klopot* v. *Metropolitan Stock Exchange*, 74 N. E. Rep. 569 (Mass.).

We are concerned with the construction of a written document, the terms of which cannot be varied by parol. *Goss* v. *Ellison*, 136 Mass. 503. There is no ambiguous word or phrase. The debts were certainly all due to the plaintiff, thereby falling under the description in the instrument. Even though the circumstances showed conclusively that the parties contemplated only a release of the debts incurred to the plaintiff under his proper name, the words of the document cannot be held to express this restriction as a fair secondary meaning. It is improbable, also, that the plaintiff could obtain any relief in equity, as the mistake which he made was one of law, concerning the effect of the written release. *Cf. Durant* v. *Bacot*, 13 N. J. Eq. 201.

RELEASE — CONSTRUCTION AND OPERATION — GENERAL WORDS LIMITED BY PARTICULAR RECITALS. — The plaintiff, the victim of a collision, accepted a certain sum from the defendant railway and executed a release in which, after enumerating all the injuries of which he was aware, he discharged the defendant from all claims of any kind whatsoever for "the injuries and damages sustained" and for any results arising or to arise therefrom. Injuries more serious than those enumerated subsequently came to light, and for these the plaintiff brought suit. *Held*, that the release is no bar to his action. *Texas, etc., Ry. Co.* v. *Dashiell*, 25 Sup. Ct. Rep. 737.

A general release is construed strongly against the releaser and cannot be varied by parol evidence that only certain claims were known to the parties. *Kowalke* v. *Milwaukee, etc., Co.*, 103 Wis. 472. It has been intimated that equity will confine such a general release to claims of which the parties were aware. See *Blair* v. *Chicago, etc., Rd. Co.*, 89 Mo. 383. This should perhaps be limited to cases where there has been fraud or mutual mistake whereby unforeseen consequences were included. *Kirchner* v. *New Home, etc., Co.*, 135 N. Y. 182. But since all parts of a written instrument are construed together, general words of release following a statement of certain liabilities are usually

governed by the particular recitals, so that demands not mentioned stand undischarged. *Todd* v. *Mitchell*, 168 Ill. 199. The principal case, though construing "the injuries sustained" as "the injuries enumerated," goes upon this broader ground. Some courts except from the discharge only entire causes of action and allow no splitting up of any one suit. *Quebe* v. *Gulf, etc., Ry. Co.*, 81 S. W. Rep. 20. Others, with the decision at hand, allow subsequent recovery for injuries forming part of the same cause of action with those enumerated. *Union Pacific Ry. Co.* v. *Artist*, 60 Fed. Rep. 365. The strict construction is severe upon the releaser, but on the whole seems much safer in practice.

STARE DECISIS — OVERRULED DECISION — INTERFERENCE WITH LIGHT AND AIR BY ELEVATED RAILROADS. — After the New York Court of Appeals had decided that damage to easements of light and air pertaining to premises adjoining a highway constituted a "taking of property," the plaintiff bought land in New York City and erected a building thereon. Later the defendant began operating an elevated railroad in front of the plaintiff's premises. A decree was entered enjoining the use of this railroad unless damages were paid. From an adverse decision of the Court of Appeals dissolving the injunction, this appeal was brought. *Held*, that the plaintiff has a vested interest which cannot be impaired without compensation. Fuller, C. J., White, Peckham, and Holmes, JJ., dissented. *Muhlker* v. *New York, etc., R. R. Co.*, 197 U. S. 544.

The court based its decision on the ground that when the plaintiff acquired title the law of New York assured him that his easements were protected. *Lahr* v. *Met. El. R. R. Co.*, 104 N. Y. 268. The dissenting opinion, however, points out that it is questionable whether the plaintiff's property rights were infringed, as his easement of access was not interfered with. If, as seems likely, the New York court might originally have decided the question either way without encountering constitutional objection, there is force in the dissenting argument that it can now distinguish the plaintiff's case so as to limit the earlier doctrine. If, however, the case falls within the principle of *Lahr* v. *Met. El. R. R. Co.*, the decision is perfectly sound. The Supreme Court has already held that it will follow a state decision in reliance on which persons have made commercial contracts, though such decision has been subsequently overruled. *Gelpcke* v. *Dubuque*, 1 Wall. (U. S.) 175. The court hereby makes an important extension of this doctrine of *stare decisis* to rights of easements acquired under judicial decisions which have thereafter been adversely passed upon. See 15 HARV. L. REV. 667.

TAXATION — PROPERTY SUBJECT TO TAXATION — TRADE-MARK OF A FOREIGN CORPORATION. — A New Jersey corporation, in carrying on its business in New York, used a valuable trade-mark, which was taxed there as a part of its capital stock. The corporation objected on the ground that the trade-mark, being intangible, existed only at its domicile in New Jersey. *Held*, that the assessment is correct. *People ex rel. Spencerian Pen Co.* v. *Kelsey*, 93 N. Y. Supp. 971.

It is settled that intangible as well as tangible property is subject to taxation. *Carroll* v. *Perry*, 4 McLean (U. S.) 25. The difficulty is in assigning the property to some *situs*. The practical method and the tendency of the law are to tax intangible property at the place where it is used in connection with tangible property. *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185. See 17 HARV. L. REV. 248. Thus, the prevailing view is that good-will is taxable within the state where it is exercised. *People ex rel. Journey, etc., Co.* v. *Roberts*, 37 N. Y. App. Div. 1. On the other hand, this same case holds that copyrights and patents, granted by the United States, are not subject to state taxation. Should the Federal Government, through its power over interstate commerce, assume a stricter control over trade-marks, it might well be urged that they should be classed with copyrights and patents. See AM. BAR ASS. REP., 1904, 547. As at present considered, however, a trade-mark is merely an element in a firm's good-will. The court, therefore, seems warranted in

extending the generally accepted doctrine of taxing good-will to the taxation of trade-marks in the state where they are used.

TORTS — INTERFERENCE WITH BUSINESS — INDUCING BREACH OF CONTRACT. — The executive council of the appellant union, which the members had asked for advice, ordered a holiday in order indirectly to raise the wages of members, but without ill-will toward their employers, the appellees. In consequence, the employees left work, in violation of their contracts. *Held*, that the union is liable for the resulting damage. *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239.

This decision is an affirmation by the House of Lords of the decision in the Court of Appeal, which was favorably commented upon in 17 HARV. L. REV. 63.

TROVER AND CONVERSION — WHAT CONSTITUTES CONVERSION — INNOCENT HOLDER OF CONVERTED MONEY. — The maker of a note took it up with stolen money at a local bank, and the amount, but not the identical funds, was forwarded to a distant bank, where the payee had deposited the note for collection. *Held*, that the payee has converted the money. *Porter* v. *Roseman*, 74 N. E. Rep. 1105 (Ind., Sup. Ct.). See NOTES, p. 55.

TRUSTS — LIABILITIES OF THIRD PARTIES — DEPOSIT TO HIS PERSONAL ACCOUNT OF CHECK MADE PAYABLE TO TRUSTEE. — An embezzling trustee deposited to his personal account in the defendant bank a check payable to him as trustee. *Held*, that the bank was not thereby put on inquiry, so as to render it liable for the embezzled moneys. *Batchelder* v. *Central National Bank*, 188 Mass. 25.

No court, certainly, could hold that, before cashing a check payable to a trustee, a bank must satisfy itself that the trustee will deal legitimately with the proceeds. See *National Bank* v. *Insurance Co.*, 104 U. S. 54, 63. But it does not follow that the bank may safely credit the check to the trustee's personal account. In the first case the proceeds may be used either in cash disbursements for the benefit of the trust estate, or to satisfy a debt of the estate to the trustee. In the second case, the former alternative is pretty conclusively negatived. Nevertheless, the chances, in such a case, that the trustee is acting dishonestly are hardly great enough to warrant a rule of law that would so seriously interfere with the freedom of the commonest form of banking transactions. The court, therefore, seems justified in not assimilating the case to the rule in regard to the sale of promissory notes payable to, or the pledge of stock standing in the name of, trustees. See *Third National Bank* v. *Lange*, 51 Md. 138; *Shaw* v. *Spencer*, 100 Mass. 382. *Cf. Ashton* v. *Atlantic Bank*, 85 Mass. 217.

WILLS — MISTAKE — CONCLUSIVENESS OF RECITAL IN WILL AS TO AMOUNT OF ADVANCES. — A testator, after reciting in his will that a son owed him £5000, forgave him all but £3000, and directed that the portion of this amount remaining unpaid at his death should be deducted from the son's share. In fact only £80 had been advanced, and nothing repaid. *Held*, that only £80 can be deducted. *In re Kelsey*, 49 Sol. Jour. 701 (Eng., Ch. D., Aug. 2, 1905).

This decision raises a question upon which the authorities are in conflict. One line of cases, following the general rule that a duly executed will cannot be modified because of mistake, hold that the recital in the will of the amount of advances removes the necessity of resorting to extrinsic evidence and is conclusive. *In re Wood*, 32 Ch. D. 517; *McAlister* v. *Butterfield*, 31 Ind. 25. The opposing cases lay stress upon the general purpose of the will to divide the estate equally among the heirs and, disregarding the recital of the amount as repugnant to such purpose, admit evidence to show what has actually been advanced. *In re Taylor's Estate*, 22 Ch. D. 495. Although the latter view more nearly approaches the real intention of the testator, yet it would seem unsupportable on principle. As the will is clear upon its face in explicitly stating the amount of the advance, it is difficult to see on what grounds evidence can be admitted to prove the mistake. *Cf. Guardhouse* v. *Blackburn*, L. R. 1 P. & D. 109.

WILLS — REVOCATION — DIVORCE OF BENEFICIARY FROM TESTATOR. — A testator bequeathed a legacy to his wife describing her as such. After the execution of the will, but two years before the testator's death, the wife procured a decree of absolute divorce from him. *Held*, that the will is not impliedly revoked by the change of circumstances. Mitchell, C. J., dissented. *In re Jones' Estate*, 60 Atl. Rep. 915 (Pa.).

The English and American courts hold that a will is revoked by the subsequent marriage of the testator and the birth of issue, and that the revocation cannot be prevented by proof of extrinsic circumstances negativing the existence of the intention to revoke. *Marston* v. *Roe*, 8 Ad. & E. 14; *Nutt* v. *Norton*, 142 Mass. 242. Several American decisions have refused to imply a similar revocation from the fact of divorce. *Charlton* v. *Miller*, 27 Oh. St. 298; *Card* v. *Alexander*, 48 Conn. 492. The opposite result was reached in a Michigan decision, where, however, the court relied somewhat on the fact of a settlement made by the parties subsequently to the decree of divorce. *Lansing* v. *Haynes*, 95 Mich. 16. To permit evidence of circumstances occurring after the divorce to determine the validity of the will would not harmonize with the previously stated doctrine of implied revocation by marriage. Moreover, neither the inference of a change of intention nor the grounds of public policy are sufficiently clear to warrant the introduction of a doctrine of implied revocation as a matter of law from the fact of divorce.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

CONSTITUTIONALITY OF GENERAL ARBITRATION TREATIES. — In an article under this title Mr. Everett P. Wheeler makes a report in behalf of a committee of the American Bar Association, sustaining the constitutionality of general arbitration treaties. *The Constitutionality of General Arbitration Treaties*, 17 Green Bag 533 (Sept. 1905). Since the article contains little more than a mere statement of a general conclusion, it is of value chiefly because of the source whence it comes. The Hague Treaty of 1899 left the matter of arbitration entirely optional with the Powers, though a permanent court of arbitration was established. See FOSTER, ARBITRATION AND THE HAGUE COURT 42. Accordingly, in 1904, the President negotiated treaties with several of the Powers, whereby the contracting parties bound themselves to submit questions of a certain nature to the permanent court established at the Hague, in cases which might prove impossible of settlement by ordinary diplomatic methods. In the second article of each of these treaties it was provided, in accordance with Article XXXI. of the Hague Treaty, that, "in each individual case the high contracting parties, before appealing to the permanent court of arbitration, shall conclude a special agreement defining clearly the matter in dispute and the scope of the powers of the arbitrators, and fixing the periods for the formation of the arbitral tribunal and the several stages of the procedure." MOORE, TREATIES AND EXECUTIVE AGREEMENTS, 20 Pol. Sci. Quar. 385. For the word agreement in the instruments, however, the Senate substituted the word treaty. The incident closed with the President's refusal to acquiesce in this amendment. Whether the Executive has the constitutional power, independent of a general arbitration treaty, to conclude special agreements under the provisions of the Hague convention, has been much discussed. See FOSTER, THE TREATY-MAKING POWER UNDER THE CONSTITUTION, 11 Yale L. J. 69; HOLLS, THE PEACE CONFERENCE AT THE HAGUE 216; HYDE, AGREEMENTS OF THE UNITED STATES OTHER THAN TREATIES, 17 Green Bag 229. That he may constitutionally be given such a power by a general